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Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

08 Cr. 0717 (JGK)

5 DAVID COPELAND REED,

6 Defendant.

7 -----x

8 March 22, 2013

9 2:45 p.m.

10 Before:

11 HON. JOHN G. KOELTL,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
16 Southern District of New York

17 BY: ROSEMARY NIDIRY

Assistant United States Attorney

18 FEDERAL DEFENDERS OF NEW YORK, INC.

Attorneys for Defendant

19 BY: SABRINA SHROFF

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1 THE CLERK: United States of America versus David
2 Copeland Reed.

3 Will all parties please state who they are for the
4 record.

5 MS. NIDIRY: Good afternoon, your Honor. Rosemary
6 Nidiry for the government.

7 MS. SHROFF: Good afternoon, your Honor. Federal
8 Defenders of New York by Sabrina Shroff on behalf of Mr. Reed.

9 Your Honor, with the Court's permission, I have
10 switched seats because my client cannot hear at all from his
11 left ear and he has some hearing on this side so I sat to his
12 right.

13 THE COURT: Oh, sure. No problem.

14 And the defendant can remain seated if the defendant
15 wishes, that's fine.

16 MS. SHROFF: Thank you, your Honor.

17 THE COURT: OK.

18 All right. The defendant is present.

19 I've received the presentence report, prepared
20 June 13, 2012, revised November 30, 2012, together with the
21 sentencing recommendation and the addendum, dated November 30,
22 2012.

23 Yes?

24 MS. SHROFF: I'm sorry, your Honor. Mr. Reed is
25 unable to hear the Court. I was wondering if -- he just can't

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1 hear you. Mr. Reed cannot hear you. I'm sorry.

2 THE COURT: That's all right. I'll -- is that because
3 I'm not talking loud enough?

4 MS. SHROFF: Yes, your Honor.

5 THE COURT: Oh, all right. I'll begin again.

6 MS. SHROFF: Thank you.

7 THE COURT: If Mr. Reed can't hear me, just raise your
8 hand, Mr. Reed. All right?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: OK.

11 I've received the presentence report, prepared
12 June 13, 2012, revised November 30, 2012, together with the
13 sentencing recommendation and the addendum dated November 30,
14 2012.

15 I've received the defense submission dated March 8,
16 2013. I've received the government's submission dated
17 March 14, 2013. I've received victim letters submitted by the
18 government on February 2, 2012 and August 23, 2012, and victim
19 letters that were attached to Court orders dated June 5, 2012
20 and August 27, 2012.

21 Is there a request for forfeiture?

22 MS. NIDIRY: Yes, your Honor. There is an agreement
23 that was in the plea agreement.

24 THE COURT: Keep your voice up.

25 MS. NIDIRY: In the plea agreement, there was an

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1 agreement to a forfeiture amount of \$12 million, and there was
2 a consent order signed by the defendant at the time of the
3 plea.

4 THE COURT: Do you have a proposed order of
5 forfeiture -- it was 12.8 million, wasn't it?

6 MS. NIDIRY: Actually, I think it was -- I will get a
7 copy.

8 (Pause)

9 Yes, your Honor. I have an order that was attached to
10 the plea agreement for 12.8 million.

11 THE COURT: All right. Show it to the defense,
12 please.

13 (Pause)

14 MS. SHROFF: Thank you, Ms. Nidiry.

15 MS. NIDIRY: (Handing to the Court)

16 (Pause)

17 THE COURT: OK. The defense agrees that I can sign
18 the order of forfeiture in connection with the sentence?

19 MS. SHROFF: Yes, your Honor.

20 THE COURT: All right. With respect to restitution,
21 the government submitted a revised victim list together with
22 its memorandum. The total amount of restitution in the revised
23 list of victims is \$4,326,373.78, and there are over 200
24 victims.

25 Does the defendant agree with that amount and those

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1 victims?

2 MS. SHROFF: For purposes of restitution, we do, your
3 Honor.

4 THE COURT: OK. All right. You say "for purposes of
5 restitution." Are you drawing a distinction between some other
6 purpose? Based on the agreement of the defense, I would
7 include an order of restitution in the judgment and attach to
8 the judgment the exhibit to the government's memo which
9 indicates the victims, the amounts, and the total of
10 \$4,326,373.78. Right?

11 MS. SHROFF: Yes, your Honor.

12 THE COURT: OK. I will deal with the other issue of
13 the guideline calculations and the 50 victims or more shortly,
14 but there is agreement with respect to the amount of
15 restitution and the victims, right?

16 MS. SHROFF: Yes.

17 THE COURT: OK. Now, Ms. Shroff, have you reviewed
18 the presentence report, the recommendation and the addendum and
19 discussed them with the defendant?

20 MS. SHROFF: I have, your Honor.

21 THE COURT: All right. Do you have any objections?

22 MS. SHROFF: Your Honor, the objections I have I noted
23 in my sentencing submission to the Court.

24 THE COURT: OK. It's --

25 MS. SHROFF: May I?

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1 THE COURT: Go ahead.

2 MS. SHROFF: May I go through them now?

3 THE COURT: If you wish. Sure. Yes. Go ahead.

4 MS. SHROFF: So my objections start with paragraph 61.

5 And as I understand the government's sentencing submission and
6 their position now, they agree that the base offense level is
7 properly 6 and not 7.

8 THE COURT: You were able to get that from the
9 government's memo? I --

10 MS. SHROFF: I'm sorry. I apologize. Not from their
11 memo. I spoke -- I apologize. Not --

12 THE COURT: The government studiously avoided any
13 discussion of guideline calculations in its memo.

14 MS. SHROFF: I apologize, your Honor. I'm confusing
15 my conversation with government counsel with the memorandum.

16 THE COURT: OK.

17 MS. SHROFF: I apologize.

18 THE COURT: So paragraph 61, you say, should be 6?

19 MS. SHROFF: Yes.

20 THE COURT: OK.

21 MS. SHROFF: I say paragraph --

22 THE COURT: We might as well take that up right now.

23 I'm inclined to agree with the defense that it should
24 be 6. The information alleges that the crime continued until
25 June of 2002. So the November 2002 guideline book should be

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1 used, and the base offense level for 2B1.1 is 6.

2 Does the government agree?

3 MS. NIDIRY: Yes, we do, your Honor. Thank you.

4 THE COURT: OK. Next.

5 MS. SHROFF: Your Honor, paragraph 63, we object to
6 the four-level enhancement, as we do to the two-level
7 enhancement reflected in paragraph 64.

8 THE COURT: OK. Now, with respect to the four-level
9 enhancement in paragraph 63 for the number of victims, which is
10 more than 50, according to the presentence report, as I read
11 your memo, the basis for the objection is that the defendant
12 didn't admit to more than 50 victims in his plea allocution
13 and, therefore, under Appendi the enhancement for more than 50
14 victims cannot be included; right?

15 MS. SHROFF: Yes, and that the government is now
16 precluded from arguing for it before the Court.

17 THE COURT: Well, of course, the Court has to make a
18 determination of the appropriate guideline calculations, and
19 the government would be entitled to respond to any questions
20 from the Court with respect to guideline calculations, even
21 though the government studiously avoided any discussion of
22 guideline calculations in its sentencing memo, right? That
23 would not be a violation of the plea agreement.

24 By the way, your argument that it should be 6 in the
25 base offense level, was that consistent with the plea

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1 agreement?

2 MS. SHROFF: No, your Honor.

3 THE COURT: Were you precluded from arguing that?

4 MS. SHROFF: No, your Honor, but there is a difference
5 and I could explain the difference to the Court.

6 THE COURT: It's all right. I've accepted the --
7 because you are right that it should be 6 and, therefore, I
8 have accepted it.

9 MS. SHROFF: Well, but here's the thing, your Honor.
10 This is not a case -- and, look, I am in an awkward position
11 and I understand the intellectual implication of what I'm about
12 to say at some level. But the government in its wealth of
13 wisdom, or whatever state of mind they were in at that time,
14 had the facts available to them. They had chosen -- they
15 agreed that they would not include the plus-50 enhancement. It
16 is not something they overlooked. Right? It wasn't a mistake
17 they made. They knew what they -- they knew then what they
18 know now. So there was no difference.

19 The fact that they chose to bargain away that during
20 the plea negotiations I think binds them now, and, therefore, I
21 think that that situation is somewhat different than the 6
22 being the base offense level.

23 THE COURT: What is the difference?

24 MS. SHROFF: Nobody realized it was 6 until I sat down
25 to write the sentencing memo. That's even when I realized it.

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1 That was just a genuine oversight on everybody's part, or
2 sloppiness, if you want to call it, on my part included.

3 But the plus 4 wasn't sloppiness. They, the
4 government, had those facts then, and in fact the fact that
5 they chose not to proceed with that enhancement should bind
6 them now. That's why we took a plea agreement.

7 THE COURT: It binds the government; it certainly
8 doesn't bind the Court, right?

9 MS. SHROFF: Absolutely correct.

10 THE COURT: The Court has to make its own
11 determination of the appropriate guideline sentencing range in
12 the case, right?

13 MS. SHROFF: Yes. That's right.

14 THE COURT: And I'm sure that when I took the
15 defendant's plea, I explained that.

16 MS. SHROFF: You did, your Honor, as you do every
17 single time. So, yes, it's true.

18 THE COURT: So now I have to make the determination of
19 whether the 18-level enhancement is -- I'm sorry, whether the
20 four-level enhancement under 2B1.1(b)(2)(B) of the 2002
21 guidelines should be added.

22 MS. SHROFF: That's right.

23 THE COURT: And then the issue is -- let's deal first
24 with the factual issue of whether there were more than 50
25 victims.

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1 It would appear to me that there were plainly more
2 than 50 victims involved. The defendant had previously agreed
3 to a restitution list of victims of over 200 and over \$4
4 million. Today, for purposes of restitution, the defendant
5 agreed to the revised restitution amount and the revised list
6 of victims, which is over 200. The presentence report
7 concluded that there were more than 50 victims and included a
8 list of victims which is over 200.

9 It would appear beyond a reasonable doubt that there
10 were more than 50 victims. The defendant hasn't submitted any
11 objections to the list of victims in the presentence report.
12 And so it would appear beyond a reasonable doubt that there
13 were more than 50 victims.

14 If there were a question of fact that had to be
15 resolved at a Fatico hearing, I would have a Fatico hearing.
16 But there really doesn't appear to be any issue of fact that
17 there were more than 50 victims of the offense.

18 Is that correct?

19 MS. SHROFF: That is correct.

20 THE COURT: OK. So then the only remaining objection
21 is Appendi. So the defense argues that the four-level
22 enhancement for 50 or more victims is in violation of Appendi.
23 The defense argues that because it wasn't alleged in the
24 Indictment and the defendant didn't specifically agree to that
25 fact at sentencing, the Court cannot find that enhancement for

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1 purposes of sentencing under Apprendi and under Booker.

2 And the defense knows that that's not right. I mean,
3 it is simply wrong as a matter of well-established law. So
4 because it is an argument that's made, I will deal with it.

5 The defendant argues that he did not admit to 50 or
6 more victims in his plea allocution, and he argues that under
7 Apprendi the Court cannot use such an enhancement unless the
8 facts of the enhancement were proved beyond a reasonable doubt
9 to a jury or admitted by the defendant at his plea allocution.
10 The argument has no merit. Apprendi holds that other than the
11 fact of a prior conviction, any fact that increases the penalty
12 of a crime beyond the prescribed statutory maximum must be
13 submitted to a jury and proved beyond a reasonable doubt.

14 It was for this reason that the Supreme Court in
15 Booker found that the Sentencing Guidelines were
16 unconstitutional if they were mandatory, but the Supreme Court
17 also found that the Sentencing Guidelines survived as
18 non-binding guidelines which sentencing courts should consider.
19 Therefore, individual factual findings under the guidelines
20 cannot increase the defendant's statutory maximum sentence.
21 The individual guideline calculations provide guidance to the
22 Court as to where within the statutory maximum the Court should
23 consider sentencing a defendant.

24 This enhancement, as other calculations under the
25 guidelines, do not and could not increase the statutory maximum

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1 penalty to which the defendant was subject. Therefore, the
2 Court of Appeals has consistently held, following Booker, that
3 enhancements under the guidelines need only be found by the
4 Court using the preponderance of the evidence standard.

5 The cases are legion in the Court of Appeals,
6 including United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005),
7 a decision by now Justice Sotomayor; United States v. Shelton,
8 2006 WL 3406840 (2d Cir. November 22, 2006) summary order;
9 United States v. Martinez, 525 F.3d 211, (2d Cir. 2008), per
10 curiam; United States v. Bland, 271 Fed. Appendix 37 (2d Cir.
11 March 25, 2008), summary order, including others.

12 Under the defense proposition all of the sentencing
13 enhancements -- in fact, all of the details of the Sentencing
14 Guidelines -- would have to be set out in an indictment when
15 the defendant went to trial or admitted by a defendant at a
16 plea allocution, which is plainly not the law. The details of
17 the Sentencing Guidelines are matters to be proven to the Court
18 by a preponderance of the evidence in connection with a
19 sentence. And in this case there is no dispute of fact that
20 there were more than 50 victims, and that fact is proven in
21 this case beyond a reasonable doubt. And so there really is
22 no -- no argument that the four-level enhancement for 50 or
23 more victims should not be included.

24 Based upon what the defendant has said, I assume that
25 it is the defense position I shouldn't even ask the government

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1 what their position is on the more than 50 victims. So I'll --
2 I mean, the government does have an interest in making sure
3 that the Court does not err in the calculation of the
4 guidelines. The Court is required to calculate the guidelines
5 as a procedural matter in connection with sentence, and I would
6 not want to err in calculating the guidelines.

7 So does the defense agree that I can at least ask the
8 government if I've erred?

9 First of all, is there anything that I've said,
10 Ms. Shroff, that is incorrect in any way?

11 MS. SHROFF: No. And, your Honor, it would not be the
12 defendant's position that the Court could not inquire. The
13 Court can do whatever the Court has said. I mean, I do not --
14 I hardly ever --

15 THE COURT: OK. I can ask the government. But I just
16 want to -- I mean, I've explained at great length what my
17 reasoning was with respect to the four-level enhancement, and
18 if there is an objection which I have missed or misconstrued or
19 something, you can bring it to my attention now.

20 MS. SHROFF: I don't think you missed anything. I
21 made the arguments that I could on behalf of my client.

22 THE COURT: OK. Does the government want to be heard
23 on this?

24 MS. NIDIRY: No, your Honor.

25 THE COURT: OK.

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MS. NIDIRY: Thank you.

THE COURT: The next -- we've gotten up to -- we went through paragraph 63, and the next paragraph, then, is 64, which is the two-level enhancement. And this actually in the memo is not raised as an Apprendi argument, it was raised as a factual argument. And I tend to agree with the defense on this issue. The enhancement would apply if a substantial part of the fraudulent scheme was committed from outside the United States or if the offense otherwise involved sophisticated means. The defendant disputes that the evidence supports this enhancement, and the government has not attempted to justify it. On the record the Court could not conclude that the enhancement has been proven. The defendant argues that his activities were committed from the United States and not from abroad, even though some foreign banks were used, and the defense contends, without opposition by the government, that there is no evidence that a substantial part of the fraudulent scheme was committed from outside the United States.

As to sophisticated means, the defense argues that there was nothing sophisticated about the scheme. The defendant made false representation about rates of return, but made no investments that would have justified such false promises and then proceeded to use the money that he obtained.

Sophisticated means should make detection of the offense more difficult, and this scheme was not difficult to

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1 detect when investigated. Therefore, the government has not
2 sought to prove that the enhancement is justified. And based
3 upon the evidence submitted to the Court, the Court could not
4 conclude that the enhancement has been proven.

5 So do the parties want to be heard on this
6 enhancement?

7 MS. SHROFF: Mr. Reed does not, your Honor.

8 MS. NIDIRY: No, your Honor.

9 THE COURT: All right. Any other objections?

10 MS. SHROFF: No, your Honor.

11 THE COURT: All right. Ms. Shroff, I'll listen to you
12 for anything that you wish to tell me in connection with
13 sentence, any statement that you would like to make, anything
14 at all you would like to tell me.

15 And, again, in order to help the defendant hear, if
16 you wish to speak from where you are, that's fine.

17 MS. SHROFF: Your Honor, as I wrote in my
18 sentencing --

19 THE COURT: Even if you want to sit, it's OK.

20 MS. SHROFF: I think it's easier for Mr. Reed if I
21 stand and speak it.

22 THE COURT: OK.

23 MS. SHROFF: He's as tall sitting as I am standing so
24 I think it's OK.

25 When I was meeting with Mr. Reed earlier this

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1 afternoon, I was reminded by something that Judge Lynch once
2 said to one of my clients. In sentencing my client, he said,
3 you know, a sentence is an important day. It is the only day
4 of reckoning you have while your feet are still on the ground
5 and you are aware of what's going on. And I think in most
6 clients' cases that is obviously the case, but for Mr. Reed
7 here it is particularly apt because Mr. Reed fully realizes the
8 immense consequences of his actions.

9 And it may sound trite or it may sound like something
10 that a defense lawyer has said before, and many a defense
11 lawyer may have said it before, but I believe that Mr. Reed is
12 cognizant of and truly remorseful of his actions not just in
13 terms of the consequences on him and his family but I think in
14 the time that this case has been pending Mr. Reed has seen a
15 true change in the person that he is. He has taken certain
16 steps and managed to change quite a bit about not only his
17 behavior but also about himself.

18 I note for the Court, your Honor, that Mr. Reed has
19 maintained employment, has lived a very simple and
20 straightforward life, demonstrating to the Court that at least
21 he is capable of that. He does not and has not reverted to any
22 inappropriate conduct or to other fraudulent schemes to support
23 himself or his family.

24 I'm not asking the Court to commend him for staying
25 crime-free while on Pretrial Services; I'm simply saying that

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1 organically he is a person that is capable of change and
2 recognizing the need for change.

3 Most telling for me is the fact that Mr. Reed does
4 have family support. And by "family support" I don't mean a
5 family that comes to court and says we are behind you, but
6 support in the sense of holding him accountable for what he's
7 done in the past. His sister is here, as are his parents; they
8 are sitting in the courtroom. And I think they are just as
9 much aware of who sits on the other side of the courtroom,
10 including Mr. Reed's victims. I think that the Reed family is
11 very cognizant of the fact that one of their own has harmed
12 another person, and I think along with Mr. Reed, they are truly
13 ashamed of those actions.

14 In my sentencing letter, your Honor, I address the
15 issue of the loss guidelines themselves. I note that the Court
16 is extremely familiar with every argument that is made about
17 the loss guidelines so I won't repeat it here.

18 On behalf of Mr. Reed, I would like to just conclude
19 by telling you that there is a certain amount not just of
20 remorse but also true shame when he looks back on what he did.
21 I ask the Court for a sentence of 36 months in this particular
22 case, because I thought about what number would accomplish not
23 just the goals of sentencing but also reflect the inflation of
24 the loss guidelines themselves. It wasn't a number that I just
25 sort of picked out of a hat.

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1 Unless the Court has any further questions, I don't
2 have anything to add.

3 THE COURT: No. Thank you, Ms. Shroff.

4 All right. Mr. Reed, have you reviewed the
5 presentence report, the recommendation and the addendum and
6 discussed them with your lawyer?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Other than your lawyer has already said,
9 do you have any additional objections to the presentence
10 report?

11 THE DEFENDANT: No, sir.

12 THE COURT: I'll listen to you for anything you would
13 like to tell me in connection with your counsel's objections or
14 anything you would like to tell me in connection with sentence.

15 THE DEFENDANT: In connection to the presentence
16 report?

17 THE COURT: Well, let's take the two things in order.
18 Is there anything else you would like to tell me in
19 connection with the objections that your counsel has made?

20 THE DEFENDANT: No, sir.

21 THE COURT: OK. I'll now listen to you for anything
22 you would like to tell me in connection with sentence, any
23 statement you would like to make on your own behalf, anything
24 you would like to say in mitigation, anything at all you would
25 like to tell me.

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1 THE DEFENDANT: Well, you have my letter that I wrote
2 to you previously, so I won't waste the Court's time with that.
3 But I understand that we only have one victim in the courtroom
4 today, but I do know how many lives I've touched and how many
5 people have been hurt by my actions. I'm truly sorry for
6 everything that I did and not only to the victims in this case
7 but the shame and the harm that I've caused my own family
8 through my actions.

9 If there was a way for me to make amends to every
10 single victim, believe me, I would; and I know that due to age
11 and other circumstances and the amount, a lot of that is not
12 possible. But I am committed to doing everything that I can to
13 live the right kind of life and to live within the law as well
14 as to make amends to the victims and everyone that I've hurt in
15 this -- in all of my actions.

16 THE COURT: All right. Thank you, Mr. Reed.

17 Ms. Nidiry, has the government reviewed the
18 presentence report, the recommendation, and the addendum?

19 MS. NIDIRY: Yes, your Honor.

20 THE COURT: Does the government have any objections?

21 MS. NIDIRY: No, your Honor.

22 THE COURT: I'll listen to you for anything the
23 government wants to tell me in connection with sentence. And I
24 understand that you live by your plea agreement, right?

25 MS. NIDIRY: Yes, your Honor. I think that's -- I

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1 won't -- we set forth in our submission why we think a sentence
2 within that range set forth in the plea agreement, or a
3 substantial range, is appropriate for this defendant because of
4 the impact his conduct had on the victims.

5 And I should have pointed out at the beginning, as the
6 defense counsel alluded to, one of the victims, Mr. Desmond
7 Kramer, is in the courtroom.

8 THE COURT: After you are done, unless you want me to
9 listen to any victims first, I was going to call on any victims
10 in the courtroom.

11 MS. NIDIRY: OK. So basically -- I don't have
12 anything further to say beyond that, unless the Court has
13 anything specific that you want to ask me about. Basically
14 because of the impact that the defendant's conduct had on these
15 victims -- and, you know, it was a deceitful -- it was fraud
16 and so he cheated people out of a substantial amount of money
17 and that should be punished. And we think that, you know,
18 things like the loss amount are -- they reflect the seriousness
19 of the conduct.

20 THE COURT: All right. If there are any victims in
21 the courtroom who wish to be heard in connection with sentence,
22 I'll listen to any victims now who wish to address the Court.

23 MR. KRAMER: Yes, your Honor.

24 THE COURT: All right. Could you come forward. Tell
25 us who you are.

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1 MR. KRAMER: Shall I speak from here?

2 THE COURT: It would be better if you came forward and
3 spoke into the microphone, if you would.

4 MR. KRAMER: I can't hear too well. I'm sorry.

5 THE COURT: If you came forward and spoke into the
6 microphone, that way everyone could hear you.

7 (Pause)

8 MR. KRAMER: Thank you.

9 Your Honor, my name is Jack Desmond Kramer. I have
10 been a citizen of the United States since 1959. And I was
11 unfortunate enough to be guided by Mr. Reed's presentations, by
12 the people who supposedly had worked for him, his agents who
13 represented him from which he earned a commission, and on the
14 basis of trust I invested all my savings with the man.

15 This has created a lot of hardship with me, and I'm
16 angry. I'm appalled that this man consciously, with full
17 knowledge of what he was doing, with the people that he was
18 hiring to do what he was doing, should defraud people in the
19 open manner in which he did, after which he simply apparently
20 closed up and wasn't anywhere to be found.

21 I accuse him of, again, creating hardship to myself
22 and two people else that I know; I can mention their names if
23 the Court so please. And that's the really extent that I have
24 to say.

25 I -- frankly, I'm disgusted at the man. I'm appalled

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1 at what he's done. I'm angry over what he's done. And I'm
2 furious at the impact that he's had on my life, with my having
3 lost all my savings.

4 THE COURT: All right.

5 MR. KRAMER: That's really all I have to say, your
6 Honor.

7 THE COURT: Thank you, Mr. Kramer.

8 I'll place the presentence report, the recommendation
9 and the addendum in the record under seal. I'd ask the parties
10 to make their submissions to the Court, place them in the
11 record not under seal after they have made sure that they've
12 redacted any personal identifying information in the
13 submissions or any information that otherwise is required to be
14 redacted under the criminal rules.

15 Is that satisfactory with both sides? Yes?

16 MS. NIDIRY: Yes, your Honor.

17 MS. SHROFF: Yes, your Honor.

18 THE COURT: OK. I adopt the findings of fact in the
19 presentence report except as follows: The defendant has raised
20 several objections to the guideline calculations in the
21 presentence report. The government has not responded to any of
22 the arguments, but the Court has the responsibility to
23 calculate the guidelines correctly, in any event.

24 Earlier in this proceeding the Court has already
25 indicated how it will resolve the various disputes under the

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1 guidelines, but it is useful to recapitulate the guideline
2 calculations and the objections to them and the Court's
3 rulings.

4 First, the defendant argues that the 2002 guidelines
5 should be used because the offense charged in the information
6 to which the defendant pleaded ended in June 2002. That is
7 correct. The government agrees also. Therefore, the Court
8 will use the 2002 guideline manual. Therefore, the base
9 offense level for a violation of 2B1.1 in this case is 6,
10 rather than 7. There is no dispute that 18 levels should be
11 added under 2B1.1(b)(1)(J) because the amount of the loss is in
12 excess of \$2,500,000 but less than \$7 million.

13 The defendant disputes the addition of four levels
14 under 2B1.1(b)(2)(B), which applies if the offense involved 50
15 or more victims.

16 I've already explained why the four levels should in
17 fact be added.

18 There is no plausible argument that the offense did
19 not involve 50 or more victims. Indeed, the evidence
20 establishes beyond a reasonable doubt that the defendant's
21 offense involved 50 or more victims. The legal argument that
22 under Apprendi and Booker the enhancement for 50 or more
23 victims must be included in the indictment and proved to a jury
24 beyond a reasonable doubt or admitted by the defendant has no
25 merit for all of the reasons that the Court has already

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1 explained. Therefore, the four-level enhancement under
2 2B1.1(b)(2)(B) should be applied.

3 The presentence report included a two-level
4 enhancement under what was 2B1.1(b)(7) in the 2002 guidelines.
5 The evidence does not support this enhancement, and, therefore,
6 that enhancement will not be included.

7 Therefore, the offense level is 6, plus 18 for the
8 loss amount, plus 4 for 50 or more victims, or 28, minus three
9 levels for acceptance of responsibility, for a total offense
10 level of 25. The Criminal History Category is I. And the
11 guidelines' sentencing range is, therefore, 57 to 71 months.

12 I appreciate that the guidelines are only advisory and
13 that the Court must consider the various sentencing factors in
14 18 U.S.C., Section 3553(a), and impose a sentence that is
15 sufficient but no greater than necessary to comply with the
16 purposes set forth in Section 3553(a)(2).

17 In this case the offense is very serious and there is
18 a need for deterrence. The amount of the fraud is very large
19 and it continued over a period of time. The victim impact
20 letters, as well as the victim testimony at the hearing,
21 indicate that people have been harmed in real ways, some on
22 retirement incomes, and that the offense has had significant
23 impact on the victims. That enhances the magnitude of the
24 crime. The amount of the loss was very large. The number of
25 victims was very large. The impact on the victims was real.

D3mdrees

Sentence

1 A substantial sentence is necessary to reflect the
2 seriousness of the crime and the need for deterrence.

3 The defendant relies in part on the effect on his
4 family from any sentence of imprisonment; but that is in fact a
5 consequence of the crime, and the defendant's family
6 circumstances are not so unusual as to warrant a reduction in
7 the sentence on that basis alone.

8 The defendant does have a reasonable argument that he
9 has demonstrated his rehabilitation because the crime is
10 alleged to have been completed in June 2002 and since that time
11 the defendant has been gainfully employed and there is no
12 evidence of a return to fraudulent activity. Moreover, the
13 defendant has been on pretrial release for about four years
14 and, therefore, has endured the restrictions on his liberty for
15 that period of time. Moreover, while not binding on the Court,
16 the government, fully aware of all of the details of the
17 defendant's crime, was prepared to agree to a plea agreement
18 with a guidelines' sentencing range of 41 to 51 months'
19 imprisonment.

20 Based on those considerations, the Court will vary
21 downwardly, modestly, to a sentence that is sufficient but no
22 greater than necessary to accomplish the goals of Section
23 3553(a)(2).

24 In this case the Court intends to impose a sentence of
25 51 months on Count One, to be followed by a three-year term of

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Sentence

1 supervised release, with the standard conditions of supervised
2 release in this district and those recommended by the Probation
3 Department.

4 The Court will recommend imprisonment in South
5 Carolina so that the defendant can be close to his family.

6 The Court will allow voluntary surrender.

7 The Court will not impose a fine because the defendant
8 lacks the ability to pay a fine, after taking into account the
9 presentence report, the requirement of forfeiture and the
10 requirement of restitution.

11 The Court will impose a forfeiture order in the
12 specific amount of \$12.8 million and the other details of the
13 forfeiture order that has been proffered to the Court and that
14 the Court has signed in connection with sentence.

15 The Court will impose restitution in the amount
16 of \$4,326,373.78, payable to the victims listed in Exhibit B to
17 the government's memo. The restitution is payable in the
18 amounts listed. Restitution is payable at the rate of
19 10 percent of the defendant's gross monthly income beginning 30
20 days after the defendant's release from imprisonment.

21 The Court will impose a \$100 special assessment.

22 The sentence is consistent with the factors in Section
23 3553(a) and is sufficient but no greater than necessary to
24 comply with the purposes of Section 3553(a)(2). It recognizes
25 the seriousness of the offense and the need for deterrence. It

D3mdrees

Sentence

1 takes into account mitigating circumstances. Because the
2 modest downward variance is justified by the facts of this
3 case, it does not result in unwarranted sentencing disparities.

4 I've already explained the reasons for the sentence.
5 Before I actually impose the sentence, Ms. Shroff, I will
6 recognize you for anything you wish to tell me.

7 MS. SHROFF: I do not have anything to add, your
8 Honor.

9 THE COURT: All right. Mr. Reed, before I actually
10 impose the sentence, I'll recognize you for anything you wish
11 to tell me, anything you would like to say, anything at all you
12 would like to tell me.

13 THE DEFENDANT: Nothing, your Honor.

14 THE COURT: Ms. Nidiry, I will recognize you for
15 anything the government wishes to tell me.

16 MS. NIDIRY: No, your Honor. Thank you.

17 THE COURT: All right. Pursuant to the Sentencing
18 Reform Act of 1984, it is the judgment of this Court that the
19 defendant, David Copeland Reed, is hereby committed to the
20 custody of the Bureau of Prisons to be imprisoned for a term of
21 51 months on Count One.

22 The defendant shall voluntarily surrender to an
23 institution designated by the Bureau of Prisons by May 31,
24 2013.

25 I recommend incarceration in South Carolina so that

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Sentence

1 the defendant can be close to his family.

2 Upon release from imprisonment, the defendant shall be
3 placed on supervised release for a term of three years.

4 Within 72 hours of release from the custody of the
5 Bureau of Prisons, the defendant shall report in person to the
6 Probation Office in the district to which the defendant is
7 released.

8 While on supervised release, the defendant shall
9 comply with the standard conditions of supervised release in
10 this district. The defendant shall not commit another federal,
11 state or local crime. The defendant shall not possess a
12 firearm, or destructive device, as defined in 18 U.S.C.,
13 Section 921.

14 The defendant shall refrain from any unlawful use or
15 possession of a controlled substance.

16 The defendant shall submit to one drug test within 15
17 days of release from imprisonment and at least two periodic
18 drug tests thereafter, as directed by the probation officer.

19 The defendant shall cooperate in the collection of DNA
20 as directed by the probation officer.

21 The defendant shall provide the probation officer with
22 access to any requested financial information. The defendant
23 shall not incur new credit charges or open additional lines of
24 credit without the approval of the probation officer unless the
25 defendant is in compliance with the installment payment

D3mdrees

Sentence

1 schedule.

2 The defendant shall pay restitution in the amount
3 of \$4,326,373.78, payable to the victims listed in Exhibit B to
4 the government's memo in accordance with the specific loss
5 amounts. Restitution is payable at the rate of 10 percent of
6 the defendant's gross monthly income beginning 30 days after
7 release from imprisonment.

8 The defendant shall notify the United States Attorney
9 for this district within 30 days of any change of mailing or
10 residence address that occurs while any portion of the
11 restitution remains unpaid.

12 The defendant shall forfeit to the United States the
13 sum of \$12.8 million, and the Court has signed an order of
14 forfeiture.

15 It is further ordered that the defendant shall pay to
16 the United States a special assessment of \$100, which shall be
17 due immediately.

18 I've already explained the reasons for the sentence.
19 Does either counsel know of any legal reason why the sentence
20 should not be imposed as I have so stated it?

21 MS. NIDIRY: No, your Honor.

22 MS. SHROFF: No, your Honor.

23 THE COURT: All right. I order the sentence to be
24 imposed as I have so stated it for all the reasons that I have
25 explained.

D3mdrees

Sentence

1 There is a waiver of the right to appeal, correct?

2 MS. NIDIRY: Yes. That is correct, your Honor.

3 THE COURT: Does either counsel know of any legal

4 reason why the waiver is not effective?

5 MS. NIDIRY: No, your Honor.

6 MS. SHROFF: No, your Honor.

7 THE COURT: OK. Mr. Reed, the reason that I asked
8 these questions is generally a defendant has the right to
9 appeal the sentence. The Notice of Appeal must be filed within
10 14 days after the entry of the judgment of conviction. The
11 judgment of conviction is entered promptly after the judge
12 announces the sentence.

13 If the defendant cannot pay the costs of appeal, the
14 defendant has the right to apply for leave to appeal in forma
15 pauperis. If the defendant requests, the Clerk will prepare
16 and file a Notice of Appeal on the defendant's behalf
17 immediately.

18 In this case the parties advise that you have given
19 up, or waived, your right to appeal, and I'm confident that
20 when I took your plea I went over the waiver of the right to
21 appeal with you. So it appears that you have waived your right
22 to appeal. But I go over this with you now because I want to
23 make sure that you discuss this issue with your lawyer so that
24 you are fully informed of all of your rights.

25 Do you understand what I've said?

D3mdrees

Sentence

1 THE DEFENDANT: Yes, sir.

2 THE COURT: All right. Open counts?

3 MS. NIDIRY: Yes, your Honor.

4 The government moves to dismiss the underlying
5 indictment.

6 THE COURT: All open counts, right?

7 MS. NIDIRY: Yes, all the counts, mm-hmm.

8 THE COURT: The government moves to dismiss all open
9 counts, and the defendant agrees, right?

10 MS. SHROFF: That is right, your Honor.

11 THE COURT: All open counts dismissed on the motion of
12 the government.

13 Anything further?

14 MS. NIDIRY: Nothing further from the government.

15 MS. SHROFF: Your Honor, may I raise one issue with
16 regard to Mr. Reed's surrender date?

17 THE COURT: Yes, sure.

18 MS. SHROFF: Your Honor, the Court ordered Mr. Reed to
19 surrender by May 31st. I ask for a later date for one
20 particular reason in this case. Mr. Reed has two children.
21 Having him surrender in the summer will mean that they will
22 have to be in day-care with the costs my client cannot afford.

23 Would the Court consider allowing him to surrender in
24 the first week of September, when they are back in school?

25 THE COURT: No. That is really a long, long time for

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Sentence

1 surrender, and I am really not inclined to do that.

2 If there is no -- obviously, if the Bureau of Prisons
3 doesn't designate a facility in time for May 31st, I would
4 extend the date but otherwise not. OK?

5 MS. SHROFF: Your Honor --

6 THE COURT: In fact, I had thought that May 31st would
7 be -- putting aside summer, would be the end of any school
8 year.

9 MS. SHROFF: The problem is they would be -- his
10 children are out all summer.

11 THE COURT: I understand the argument with respect to
12 summer camp, or day-care, but I thought May 31 would be a
13 reasonable time.

14 OK. Anything else?

15 MS. SHROFF: No, your Honor.

16 THE COURT: All right. Good afternoon, all.

17 MS. SHROFF: Good afternoon.

18 MS. NIDIRY: Thank you.

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